STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 7-80:

HAVRE EDUCATION ASSOCIATION,
Complainant,
- vs -
HILL COUNTY SCHOOL DISTRICT NO. 16 AND A, HAVRE, MONTANA
Defendant.

FINAL ORDER

* *

No exceptions having been filed, pursuant to ARM 24.26.215 (2), to the Findings of Fact, Conclusions of Law and Recommended Order issued on August 12, 1980;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 25th day of November, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley, Chairman

* *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above FINAL ORDER to the following persons on the 28 day of November, 1980:

Emilie Loring
HILLEY & LORING, P.C.
1713 Tenth Avenue South
Great Falls, MT 59405

David Rice
Deputy Hill County Attorney
312 Third Street
Havre, MT 59501

Jennifer Jacobson

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE No. 7-80:

HAVRE EDUCATION ASSOCIATION, Complainant, vs. HILL COUNTY SCHOOL DISTRICT No. 16 AND A, HAVRE, MONTANA Defendant.	)	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER.

* *

On February 5, 1980, Complainant, Havre Education Association (Association) filed an unfair labor practice against the Defendant, Hill County School District 16 & A (School District), alleging that the School District had failed to bargain in good faith and thereby committed an unfair labor practice as defined in 39-31-401(5), MCA. More specifically, the Association claims that the School District, by refusing to submit a grievance to arbitration, refused to bargain in good faith.

The parties waived a factual hearing, and agreed to submit the matter for decision on the following facts:

1. Complainant Havre Education Association is an unincorporated association affiliated with the Montana Education Association, a non-profit corporation organized under the laws of the State of Montana, maintaining its offices in Helena, Montana. Both Associations are labor organizations within the meaning of Section 39-31-103(5) MCA. Complainant Association is the recognized exclusive bargaining agent for Defendant's professional employees.

2. Defendant is a body corporate school district with principal offices in Havre, Montana, and is a political subdivision of the state of Montana, created and existing under the Constitution and laws of that state. Defendant operates the elementary and secondary schools in Havre, Montana.

3. Robert Jackson is employed as an elementary teacher by

Defendant. Jackson was interviewed by Defendant's former Superintendent of Schools, Joe Lutz, on or about June 6, 1978 and was offered a teaching contract with Defendant School for 1978-79. His contract was renewed for 1979-80.

4. Plaintiff and Defendant had collective bargaining agreements for 1978-79 and 1979-80, both of which contained grievance procedures culminating in final and binding arbitration.

5. The 1978-79 Collective Bargaining Agreement contained the following salary schedule and qualifications:

A. SALARY SCHEDULE FOR 1978-79 ($9,900 Base of M.E.A. Attainment Level 4.1)

Yrs. Exp.	B.A.	B.A.+1	B.A.+2	B.A.+ 3/or 5th Year	M.A.	M.A.+1
0	9,900	10,240	10,590	10,760	10,930	11,280
1	10,300	10,680	11,060	11,250	11,440	11,820
2	10,700	11,120	11,540	11,750	11,960	12,370
3	11,110	11,570	12,010	12,240	12,470	12,910
4	11,510	12,010	12,480	12,730	12,980	13,450
5	11,910	12,450	12,950	13,220	13,490	13,990
6	12,310	12,890	13,420	13,710	14,000	14,540
7	12,710	13,330	13,900	14,210	14,520	15,080
8	**13,120	**13,770	**14,370	**14,700	**15,030	**15,620
9	13,520	14,220	14,840	15,190	15,540	16,160
10	13,920	14,660	15,310	15,680	16,050	16,710
11		15,110	15,790	16,170	16,560	17,250
12			16,260	16,670	17,070	17,790
13				17,160	17,590	18,330
14					18,100	18,880
15					18,610	19,420

**Top point at each level that a teacher new to Havre Schools will be paid.

B. Evaluation

1. Credit for work beyond the B.A. will be granted for those credit hours actually taken following the granting of the degree including requirements for the teaching certificate, and should be in the teacher's field of special interest and will be according to the following schedule:

B.A. +1
B.A. +2
B.A. +3
M.A.
M.A. +1

a. In order to qualify for the B.A. +1, 15 quarter credits must be earned and need not be on the graduate level.

b. In order to qualify for the B.A. +2, 30 quarter credits must be earned, 15 of which must be on the graduate level.

d. In order to qualify for the M.A., an official transcript from the degree granting institution must be presented to the Business office stating that the M.A. Degree has been granted.

e. Credits earned more than six (6) years previous to the time of request for a step-up on the salary schedule will not be accepted toward meeting the requirement. (Note: After initial placement on the salary schedule, the credits earned for each succeeding step-up must be earned within a six (6) year period of time.)

f. Teachers who have an Approved 5th Year Program underway at the time of the adoption of this policy (January, 1973) will be permitted to complete the 5th Year Program.

g. All credits will be evaluated as of September 1, for advancement on the salary schedule and contract purposes, regardless of the month of graduation or completion of credit, and must be filed with the Clerk of the Board within 60 days following the first day of service each fiscal year.

a. Example: Credits which are completed after September 1 of each fiscal year will apply to the contract for the next ensuing school year, and not the current contract.

6. Defendant credited Plaintiff with five years experience in 1978-79.

7. When he began working for Defendant Plaintiff had a Bachelor's Degree and thirty-four (34) additional quarter credits within the previous six years, of which twenty-five (25) were graduate credits. Plaintiff's transcript of credits was filed with the Clerk of the Board within sixty days of Plaintiff's first day of service. Plaintiff was paid a salary of $11,910 for the 1978-79 academic year by Defendant. The 1978-79 Collective Bargaining Agreement provided for a salary of $12,950 for teachers with Plaintiff's credited experience and education.

8. The 1979-80 Collective Bargaining Agreement contained the following salary schedule and qualifications:

A. SALARY SCHEDULE FOR 1979-1980 (Base of $10,400-Attainment Level 4.1)

Yrs. Exp.	B.A.	B.A.+1	B.A.+2	B.A.+3	M.A.	M.A.+1
0	10,400	10,760	11,130	11,310	11,480	11,850
1	10,820	11,220	11,620	11,820	12,020	12,420
2	11,240	11,690	12,120	12,340	12,560	12,990
3	11,670	12,150	12,610	12,860	13,100	13,560
4	12,090	12,610	13,110	13,370	13,640	14,130
5	12,510	13,080	13,610	13,890	14,170	14,700
6	12,930	13,540	14,100	14,410	14,710	15,270
7	13,360	14,010	14,600	14,920	15,250	15,840
8	**13,780	**14,470	**15,090	**15,440	**15,790	**16,410
9	14,200	14,930	15,590	15,960	16,320	16,980
10	14,620	15,400	16,090	16,470	16,860	17,550
11		15,860	16,580	16,990	17,400	18,120
12			17,080	17,510	17,940	18,690
13				18,030	18,470	19,260
14					19,010	19,830
15					19,550	20,400

**Top point at each level that a teacher new to Havre Schools will be paid.

B. EVALUATION OF CREDITS

1. Credits for work beyond the B.A. will be granted for those credit hours actually taken following the granting of the degree including requirements for the teaching certificate. Six (6) of 15 credits for each level change on the schedule (12 of 30 credits for movement from B.A. + 30 to Equivalency) must be in the teacher's assigned areas of teaching, extra-curricular assignments, or for elementary degrees in the area of concentration. (If no area of concentration is given, an area of concentration will be determined by the superintendent and agreed to by the individual teacher.)

   The remaining credits can be in the teacher's major or minor fields, psychology, guidance or education. While the Board recognizes the value of most education credits, it finds that some are applicable to certain teachers only. Acceptance of education credits will be determined by the Teacher Credit Evaluation Committee.

   a. In order to qualify for the B.A. +1, 15 quarter credits must be earned and need not be on the graduate level.

   b. In order to qualify for the B.A. +2, 30 quarter credits must be earned, 15 of which must be on the graduate level.

   c. In order to qualify for the B.A. +3, 45 quarter credits must be earned, 30 of which must be on the graduate level.

   d. In order to qualify for the M.A., an official transcript from the degree granting Institution must be presented to the Business Office stating that the M.A. Degree has been granted.

e. Credits earned more than six (6) years previous to the time of request for a step-up on the salary schedule will not be accepted toward meeting the requirement. (Note: After initial placement on the salary schedule, the credits earned for each succeeding step-up must be earned within a six (6) year period of time.)

f. All credits will be reported to the Superintendent of Schools by the last day of the first week of school for advancement on the salary schedule and contract purposes. Credits completed after this date of each fiscal year will apply to the contract the next ensuing school year and not to the current contract. Official transcripts must be filed within 60 days following the first day of service each fiscal year.

9. Defendant credited Plaintiff with six years experience in 1979-80.

10. Plaintiff is being paid a salary of $12,930 for the 1979-80 academic year by Defendant. This is being paid in twelve installments of $1077.50 each. The 1979-80 Collective Bargaining Agreement provides for a salary of $14,100 for teachers with Plaintiff's credited experience and education.

11. Complainant and the Montana Education Association staff member whose responsibilities include assistance to the complainant have attempted to resolve this problem through the grievance procedure. Defendant has refused to process the grievance or to submit it to arbitration.

DISCUSSION

The Association argues that, upon its request, the School District has an obligation to process and submit to arbitration Robert Jackson's grievance concerning his initial placement on the negotiated salary schedule of the 1978 Collective Bargaining Agreement (hereinafter referred to as the 1978 Agreement). This duty to process Jackson's grievance and to submit it to arbitration allegedly arises out of the 1978 Agreement in which the School District agreed to a grievance procedure, culminating in final and binding arbitration. The Association argues finally that the School District's refusal to process the grievance and submit it

to arbitration is a refusal to bargain in good faith.

The School District contends that Jackson's initial placement on a negotiated salary schedule is not a proper subject for the grievance procedure and arbitration, and the School District therefore need not process Jackson's grievance. To support this contention, the School District has basically two arguments: 1. that initial placement on a salary schedule is within the hiring and assigning prerogative of the School District and is therefore neither a mandatory subject of bargaining nor a negotiated item covered in the 1978 Agreement; and 2. that Jackson was not subject to the 1978 Agreement at the time he executed his initial hiring contract with the School District.

The following issues, then, warrant discussion:
(1) whether an employer may refuse to process and to arbitrate a grievance on the grounds that the subject matter of the grievance is within the hiring and assigning prerogative of the employer;
(2) whether Jackson was covered by the 1978 Agreement when he signed his individual hiring contract with the School District; and
(3) whether the School District's refusal to arbitrate and to process Jackson's grievance is a refusal to bargain in good faith.

According to the School District, initial placement on a salary schedule falls under the employer's prerogative to hire because the 1978 Agreement provides that "selection of teachers and other personnel" shall not be a matter for negotiation. The School District further argues that initial placement falls under the employer's prerogative to "hire, promote, transfer, assign, and retain employees" as defined in section 39-31-303(2), MCA. Moreover, the District claims that salary placement is restricted from negotiation and arbitration because the employment of teachers is statutorily delegated to the Board of Trustees under section 20-3-324(1), MCA.

The School District's argument holds little merit in light of two prior decisions of this Board: City of Billings v Local 521, I.A.F.F., ULP (hereinafter referred to as the Firefighter's case); and Painters Local 1023 v Montana State University, ULP No. 1-1975 (hereinafter referred to as the Painter's case).

In the Firefighter's case, the issue presented was whether an employer may refuse to arbitrate a matter on the grounds that the subject matter of the grievance concerns management rights. The policy of the state of Montana, as set forth in section 39-31-101 and section 39-31-306(2), MCA, served as a guide for the discussion of this issue. Section 39-31-101 reads:

> In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.

Section 39-31-306(2) reads:

> (2) An agreement may contain a grievance procedure culminating in final and binding arbitration of unresolved grievances and disputed interpretations of agreements.

It was noted that a grievance procedure which culminates in final and binding arbitration is one mechanism in collective bargaining which allows employers and employees to arrive at friendly adjustment of all disputes. Because of the policy established by the legislature to encourage the friendly adjustment of all disputes, it was further noted that it is essential for this Board to encourage the enforcement of those contractual provisions wherever possible.

In the Painter's case, the employer refused to submit a grievance to arbitration, arguing that if one party to an alleged dispute does not recognize the dispute because it feels no provision of the contract is being addressed, then in fact the dispute does not exist. The employer argued further that it was for the hearing examiner to decide whether or not the grievance existed. In response to this issue, the Painter's decision reads:

> It is not within the jurisdiction of the Board, to decide whether grievances are suitable for submission to contractual procedures. Nor is it the right of management or labor to resolve disputes of the contract by ignoring them. The only party which can initiate or withdraw a grievance is the aggrieved party, if the grievance procedure is to be utilized at all.
>
> . . . Reiterating, it is not within the jurisdiction of the Board to rule on the merits of the grievance in question. Whether or not the unilateral action of permitting students to paint their own rooms is justified or not under the existing contract is not the question here. What is in question however, is did the Employer by refusing to take part in the 'contractual mechanism' for the ongoing process of collective bargaining, refuse to bargain in good faith? The answer to this question is in the affirmative.

After quoting these paragraphs in the Painter's decision, it was decided in the Firefighter's case that the employer's rights were sufficiently protected by the arbitration procedure in the contract, and by redress to the district court if the arbitrator's order was issued contrary to the contract. Further, it was concluded that to conduct a hearing to decide if the grievance concerned a management right would take the matter outside the contractual agreement between the parties, and would result in a circumvention of the intent of the Montana legislature when it passed the Collective Bargaining Act for Public Employees. For these reasons, the employer was found to have bargained in bad faith and was ordered to proceed with the agreed upon arbitration procedure.

Although the same considerations apply to Jackson's grievance as were applied in the Painter's case and the Firefighter's case, the position which this Board took in these two cases should be explained. In the Painter's case, the hearing examiner concluded that it was not within the jurisdiction of the Board to decide whether grievances are suitable for submission to contractual procedures. To follow this type of approach strictly would result in a per se requirement that all grievances must be submitted to arbitration, even if the parties themselves specifically agreed to exclude certain matters from arbitration. Such a per se requirement would fail to acknowledge that parties to a collective bargaining

agreement may specifically limit an arbitration clause.

Moreover, to say that this Board may not decide whether grievances are suitable for submission to contractual procedures, would fail to recognize that indeed this Board has the jurisdiction to interpret and enforce a contract when that contract is the center of the unfair labor practice charge. In NLRB v Strong, 393 U.S. 357, 70 LRRM 2100(1969), the court said that where it is necessary to adjudicate an unfair labor practice, the NLRB may interpret and give effect to the terms of a collective bargaining contract.[1]

The role of this Board in interpreting a grievance procedure or arbitration clause of a collective bargaining contract is nevertheless very limited. A good explanation of such a limited role was set down in the "Steelworkers' trilogy".[2]

In Steelworker's v American Manufacturing the court said:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking a claim is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. 46 LRRM 2415.

Similarly, it is not the place of this Board to decide the merits of the grievance. Rather, this Board must decide whether the claim of the aggrieved party is on its face governed by the collective bargaining contract. As pointed out in Steelworkers v Warrior Navigation, the inquiry is limited to "whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made". 46 LRRM 2419. In deciding this inquiry, it is the national policy that the agreement be sent to the arbitrator unless it is undeniably clear that the arbitration clause does not cover the asserted dispute. The court in Warrior

---

[1] Citing C & C Plywood v NLRB, 385 U.S. 421, 64 LRRM 2065(1967). See also, NLRB v Acme Industrial Co. 385 U.S. 432, 64 LRRM 2069(1967).

[2] Steelworkers v American Manufacturing Co., 363 U.S. 564, 46 LRRM 2414(1960); Steelworkers v Warrior & Gulf Navigation Co. 363 U.S. 574, 46 LRRM 2416(1960); Steelworkers v Enterprise Wheel & Car Corp. 363 U.S. 593, 46 LRRM 2423(1960).

Navigation said:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 46 LRRM 2420.

The Board's adoption of this policy does not preclude the raising of a defense of arbitrability before the arbitrator. This Board need only decide that the parties agreed to arbitrate the matter in dispute. If this Board decides that the parties agreed to arbitrate a certain matter, this Board is then obligated to order the grievance processed and sent to arbitration, if necessary. In cases of doubt, the grievance should be processed. If the parties themselves specifically agree to exclude certain matters from arbitration, then this Board should not order the parties to undergo an expensive and time-consuming arbitration.

The question therefore remains in this case whether the subject matter of the grievance is within the hiring and assigning prerogative of the School District, and thereby statutorily excluded from arbitration.

It must be remembered that under the Collective Bargaining Act for Public Employees the prerogatives of a public employer are limited by mandatory subjects of bargaining as set forth in section 39-31-305, MCA. Under this section it is the duty of the employer to bargain collectively in good faith "with respect to wages, hours, and fringe benefits." Salaries are a mandatory subject of bargaining and are therefore a legally negotiable item. Further, in the 1978 Agreement under Subjects for Negotiation the parties agreed: "It shall be the duty of both parties to negotiate and bargain in good faith on matters relating directly to salaries, fringe benefits, hours, and other terms of employment."

The School District's argument that initial placement on a negotiated salary schedule is within its hiring prerogative and is not a negotiable item holds little merit. The 1978 Agreement obligates the School District to negotiate and to bargain in good

faith on wages; section 39-31-305(2), MCA, makes wages a legally negotiable item and a mandatory subject of bargaining. The School District seems to have overlooked that it negotiated a salary schedule with the Association in 1978. Placement on that salary schedule determines the wages of the teacher employed by the School District. Wages, then, is the center of Robert Jackson's grievance with the School District, and the School District both contractually and statutorily has the duty to negotiate and to bargain in good faith on such a matter.

The School District agreed to a grievance procedure which requires that in order for a grievance to be submitted for arbitration it must deal "only with an alleged misapplication or misinterpretation of a negotiated agreement item." The School District negotiated a salary schedule and Jackson is disputing his placement on that schedule. Clearly, such a grievance meets the requirements of the 1978 Agreement as a grievance based upon the misapplication or misinterpretation of a negotiated item.

The second issue to discuss is whether Jackson was covered by the 1978 Agreement when he signed his individual hiring contract with the School District. The School District claims that it is not bound by the terms of the 1978 Agreement until the individual it chooses to hire has signed his employment contract. This argument fails because of the black letter rule first set down in J.I. Case v N.L.R.B., 321 U.S. 332, 14 LRRM 501(1944), which provides that the individual hiring contract is subsidiary to, and in fact superseded by, the collective bargaining agreement.

The court in J.I. Case reasoned that the employee must be considered as a "third party beneficiary" to all of the benefits of the collective bargaining agreement. Because the employee is a third party beneficiary to the collective bargaining agreement, the court concluded that the individual hiring contract is subsidiary to the terms of the collective bargaining agreement. 14 LRRM 504.

The court in J.I. Case noted further that in order for the National Labor Relations Act not to be reduced to a futility, private individual contracts must yield to the procedures proscribed by the Act. In this context, the court set down the rule that the individual contract is superseded by the collective bargaining agreement:

> It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment. J.I. Case, 14 LRRM 501, 504(1944).

Similarly, the benefits and advantages of the 1978 Agreement are available to Jackson, whatever the terms of his pre-existing contract. Otherwise, the Collective Bargainin Act for Public Employees and the negotiated provision for a salary schedule would be rendered meaningless. An employer could hire all new people, at any wages, thereby circumventing its obligations under its collective bargaining agreement, and denying its employees access to an agreed upon grievance procedure. The School District therefore cannot prevail in its argument.

Such a conclusion is consistent with a previous decision of this Board in which it was decided that an employer could not unilaterally negotiate terms different from those in the collective bargaining contract with prospective or newly hired employees. In American Association of University Professors v Eastern Montana College, ULP #16-78, it was concluded: "An employer's unilateral action in altering the terms and conditions of employment for new hires without first giving notice to, and conferring in good faith with, the union constitutes an unlawful refusal to bargain."3

The last issue to decide, then, is whether the School District's refusal to process Jackson's grievance is a refusal to bargain in

---

3 Citing NLRB v Katz, 369 U.S. 736, 50 LRRM 2177(1962).

good faith. In the Firefighter's case and in the Painter's case, this Board held that when an employer agrees to a grievance procedure, culminating in final and binding arbitration, its refusal to submit a grievance to arbitration is a refusal to bargain in good faith. That position was modified so that this Board would look to the collective bargaining contract to see if the parties agreed to process the grievance in dispute, and in cases of doubt the grievance will be ordered processed.

If it is determined that the grievance in dispute is covered by the procedures in the collective bargaining agreement, then a refusal to submit such a grievance to arbitration must be considered a refusal to bargain in good faith. Moreover, as pointed out in the Firefighter's case, it is the duty of this Board to encourage and support agreements which provide the necessary mechanisms to reach friendly adjustments of disputes. It must therefore be concluded that the School District, by refusing to process Jackson's grievance, refused to bargain in good faith.

CONCLUSION

1. The School District has the duty both contractually and statutorily to negotiate and bargain in good faith on a matter concerning the initial placement on a negotiated salary schedule.

2. Robert Jackson was entitled to the benefits of the 1978 Collective Bargaining Agreement when he signed his individual contract with the School District.

3. By refusing to process Robert Jackson's grievance, the School District has failed to bargain in good faith as required in section 39-31-305, MCA, and thereby committed an unfair labor practice as defined in section 39-31-401(5), MCA.

RECOMMENDED ORDER

1. The school District shall cease and desist from refusing to process Robert Jackson's grievance.

2. The School District shall proceed with the processing of

Robert Jackson's grievance as provided in the 1978 Collective Bargaining Agreement.

Dated this 12th day of August, 1980.

BOARD OF PERSONNEL APPEALS

BY Elizabeth L. Griffing
ELIZABETH L. GRIFFING
Hearing Examiner

NOTICE

Written exceptions may be filed to these Findings of Fact, Conclusions of Law, and Recommended Order within twenty days after service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Recommended Order shall become the Final Order of the Board of Personnel Appeals. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

CERTIFICATE OF MAILING

I, Jennifer Jackson, do hereby certify and state that I did on the 12th day of August 1980, mail a true and correct copy of the above Findings of Fact; Conclusions of Law; and Recommended Order to the following:

Emilie Loring
Hilley & Loring, P.C.
1713 Tenth Avenue South
Great Falls, MT. 59405

David Rice
Deputy Hill County Attorney
312 Third Street
Havre, MT. 59501

PAD3:J